

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 15, 2014

v

DEMARCUS ANDANTE WARE,

Defendant-Appellant.

No. 314864
Ingham Circuit Court
LC No. 12-000908-FH

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2), and domestic assault, MCL 750.81(4). The trial court sentenced defendant to prison terms of seven to 30 years for the first-degree home invasion conviction and 17 months to 3 years for the domestic assault conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from his entry without permission into his girlfriend's home and the subsequent assault of his girlfriend. Defendant's theory was that he resided at the home with his girlfriend and so could not have entered the home without permission.

Defendant first argues that the trial court erred when it allowed the prosecutor to present rebuttal evidence that defendant was a registered sex offender. We review for an abuse of discretion a trial court's evidentiary rulings. *People v Sabin*, 463 Mich 43, 60; 614 NW2d 888 (2000).

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403. The trial court is in the best position to determine the prejudicial effect of evidence. *People v Albers*, 258 Mich App 578, 588; 672 NW2d 336 (2002).

The evidence was relevant to a critical issue and defense, i.e., defendant's residential address. Defendant claimed that he lived at the victim's home and therefore could not have entered without permission. However, evidence that defendant's registered address for purposes

of complying with sex offender registration requirements was his mother's home made it more probable that he did not live at the victim's home. MRE 401. Moreover, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was only offered in rebuttal after defendant presented evidence that he lived in the victim's home. Additionally, the trial court instructed the jury that the evidence should be considered only for the purpose of determining where defendant lived, and not for any other purpose. The trial court was in the best position to judge the effect of the evidence. Defendant has not shown that the trial court abused its discretion by failing to exclude relevant evidence under MRE 403. *Albers*, 258 Mich App at 588-589.

Next, defendant argues that the trial court erred by denying his motion for a directed verdict because the evidence was not sufficient to establish that defendant did not have permission to enter the home. We disagree.

We review de novo a trial court's ruling on a motion for a directed verdict. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). We examine the record to determine whether the evidence presented by the prosecution, viewed in a light most favorable to the prosecution, could convince a rational trier of fact that the essential elements of the charged offense were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the offense. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The elements of first-degree home invasion are: (1) the defendant broke and entered or entered without permission a dwelling "with intent to commit a felony, larceny, or assault in the dwelling," and during the course of entering, being present in, or exiting the dwelling "commits a felony, larceny, or assault" is guilty of first-degree home invasion if at any time (2) the defendant is "armed with a dangerous weapon[]" or "[a]nother person is lawfully present in the dwelling." MCL 750.110a(2).

Defendant argues that the trial court erred by failing to direct a verdict on the charge of first-degree home invasion because a rational jury could not have found that defendant entered without permission the home of the victim because the evidence showed that he also lived in the home. We disagree. The prosecution presented evidence that defendant entered the home with a key he had been told to return, that he did not have the code to the alarm system, that he was registered as a sex offender at his mother's address, that he lived at a different location, and that the victim had told him repeatedly to leave the home.

The jury was entitled to weigh the evidence and decide what evidence it would accept as credible. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). The evidence presented, if believed by the jury, was sufficient to allow a rational jury to find that defendant did not live at the victim's home and that he entered the home without permission. The trial court properly denied defendant's motion for a directed verdict. *Aldrich*, 246 Mich App at 122; *Schultz*, 246 Mich App at 702.

Defendant next argues that the trial court abused its discretion by finding him in contempt and imposing a 93-day jail sentence without affording him the requisite due process. We disagree.

We review for clear error a trial court's findings in a contempt proceeding, and review for an abuse of discretion a trial court's decision to hold a party or individual in contempt. *In re Contempt of Henry*, 282 Mich App 656, 668, 671; 765 NW2d 44 (2009). Because defendant did not preserve this issue our review is for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

A court may summarily punish contempt if the contempt is committed in the immediate view and presence of the court and immediate corrective action is necessary. MCL 600.1711(1); *In re Contempt of Henry*, 282 Mich App at 675. Due process is satisfied by summary punishment for direct contempt. *In re Contempt of Warriner*, 113 Mich App 549, 554-555; 317 NW2d 681 (1982). Punishment for contempt committed outside the presence of the court may not be imposed until proof of the facts charged has been made and the defendant has been afforded an opportunity to present a defense. MCL 600.1711(2); *In re Contempt of Henry*, 282 Mich App at 675. The defendant must be informed of the nature of the charge, must be given time to prepare a defense and secure the assistance of counsel, and must be permitted to produce witnesses on his behalf. *In re Contempt of Henry*, 282 Mich App at 671-672.

The due process requirements of criminal contempt were met in this case. The contempt charged, i.e., contacting the victim, was committed outside the presence of the court. Defendant was informed of the contempt allegations in the morning following the testimony of the victim and was informed of the testimony to be presented against him. A hearing was held that afternoon. Defendant had time to prepare a defense, he was represented by counsel, and he cross-examined the witnesses. The trial court found defendant in contempt based on the testimony of the victim and the prosecutor whose cell phone defendant borrowed to contact the victim. There was sufficient evidence that defendant was guilty of contempt, and there is nothing on the record that establishes that plain error occurred.

Next, defendant argues that the trial court erred in scoring Offense Variable (OV) 10, MCL 777.40, exploitation of vulnerable victim, at 10 points, and that the error entitles him to resentencing. We disagree.

We review for clear error the trial court's factual findings under the sentencing guidelines; those findings must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo the application of the facts to the law. *Id.*

Offense Variable 10 should be scored at 10 points if defendant exploited a domestic relationship. MCL 777.40(1)(b). The mere existence of a domestic relationship does not mandate a conclusion that the victim was vulnerable. MCL 777.40(2). The term "exploit" as used in MCL 777.40 means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). A victim is vulnerable if the victim is readily susceptible to "injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

Defendant does not dispute that he and the victim had a domestic relationship, and evidence on the record supports the scoring of OV 10 at 10 points. The evidence showed that defendant used a key to enter the victim's home. Defendant had refused to return the key when the victim asked him to do so. Thus, defendant was able to manipulate the domestic relationship to gain access to the victim's home and to assault her. The fact that the victim defended herself by biting defendant did not compel a conclusion that she was not a vulnerable victim. The trial court's scoring of OV 10 was supported by the requisite evidence. *Hardy*, 494 Mich at 438. Defendant is not entitled to resentencing.

Defendant also raises three issues in his Standard 4 brief. He first argues that the trial court abused its discretion by refusing to appoint new counsel upon defendant's request. A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

An indigent defendant has a guaranteed the right to counsel, but is not entitled to have the attorney of his choice appointed and may not simply request that the attorney originally appointed be replaced. *Traylor*, 245 Mich App at 462. The appointment of substitute counsel is warranted only after a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Id.* Good cause exists when a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.*

Defendant has not shown that the trial court abused its discretion by refusing to appoint substitute counsel. First, defendant has not shown good cause for the appointment of new counsel. Defendant points to no legitimate difference of opinion, and it is clear from the record that defense counsel put forth substantial effort to defend defendant. Secondly, defendant has not shown that appointment of substitute would not unreasonably disrupt the judicial process. Defendant made the request for new counsel after the prosecution had rested. For the trial court to have appointed new counsel at this stage would have caused an unreasonable disruption of the trial process.

Next, defendant argues that he was denied the effective assistance of counsel as the result of a language barrier, socio-economic disparity, or some other reason that resulted in the failure of the working relationship between defendant and counsel. Defendant did not move for a new trial or evidentiary hearing in the trial court. Therefore, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is

presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. A trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008).

Defendant had not shown that trial counsel's actions were unreasonable or resulted in prejudice to him. Defendant fails to assert any reason that trial counsel was ineffective other than pointing to general communication issues. Furthermore, the record reveals that defense counsel did a substantial job of representing defendant. Defendant does not specify how, but for counsel's error, the result of the trial would have been different. Defendant has not overcome the presumption that counsel rendered effective assistance.

Finally, we have already addressed and rejected defendant's argument that the evidence was insufficient to support his home invasion conviction.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck